

**In re: CAPTAIN JACK'S TOMATOES, INC., AND THE FRESH GROUP, LTD., d/b/a MAGLIO AND COMPANY.
PACA Docket No. D-00-0008.
Decision and Order as to The Fresh Group, Ltd., d/b/a Maglio and Company.
Filed April 30, 2002.**

PACA – Failure to pay – Willful, flagrant, and repeated violations – Responsibly connected – Civil penalty – Sanction policy – Sanction testimony – Settlement negotiation documents – Waiver of confidentiality – License suspension.

The Judicial Officer (JO) affirmed the Decision and Order issued by Chief Administrative Law Judge James W. Hunt: (1) concluding The Fresh Group, Ltd., d/b/a Maglio and Co. (Respondent), willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly for produce; (2) assessing Respondent a \$150,000 civil penalty; and (3) providing for a 60-day suspension of Respondent's PACA license if the civil penalty is not paid within 90 days after service of the Order on Respondent. The Judicial Officer found that Captain Jack's Tomatoes, Inc. (CJTI), violated 7 U.S.C. § 499b(4) and Respondent was liable for these violations because Respondent exercised complete domination and control over CJTI's day-to-day operations during the time the violations occurred. Respondent was therefore a dealer and bore responsibility for CJTI's unlawful actions. The JO rejected Respondent's contention that Complainant must establish Respondent was responsibly connected with CJTI in order to prove that Respondent violated 7 U.S.C. § 499b(4) stating that administrative proceedings to determine whether a person is "responsibly connected," as defined in 7 U.S.C. § 499a(b)(9), are instituted under 7 U.S.C. § 499h(b). The issue in these "responsibly connected" cases is whether one person is or has been responsibly connected with another person: (1) whose PACA license has been revoked or is currently suspended; (2) who has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b; or (3) against whom there is an unpaid reparation award issued within 2 years. A person found to be responsibly connected is barred from employment by PACA licensees, except as provided in 7 U.S.C. § 499h(b). The JO stated the proceeding before him was not a proceeding instituted under 7 U.S.C. § 499h(b) to determine whether Respondent is responsibly connected with CJTI and barred from employment by PACA licensees. Instead, the proceeding was an administrative disciplinary proceeding instituted under the PACA to determine whether willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) had been committed and, if they had been committed, the identity of the entity or entities that committed the violations. The JO also rejected Respondent's contention that evidence supporting a civil penalty in excess of \$22,000 was inadmissible. The JO stated that oral and documentary evidence supporting Complainant's proposed sanction was relevant and under 7 U.S.C. § 499h(e) the Secretary of Agriculture had authority to assess Respondent a civil penalty in excess of \$22,000. Finally, the JO rejected Respondent's argument that Complainant's sanction witness could not testify about information in documents Respondent provided to Complainant's counsel during settlement negotiations. The JO found that Respondent filed these same documents with the Hearing Clerk as proposed exhibits and Complainant had no reason to treat Respondent's filing of proposed exhibits as confidential.

Ruben D. Rudolph, Jr., for Complainant.
Jordan B. Reich, for Respondent.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on March 14, 2000. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) Captain Jack's Tomatoes, Inc., under the direction, management, and control of The Fresh Group, Ltd., d/b/a Maglio and Company [hereinafter Respondent], during the period December 7, 1998, through

December 29, 1998, failed to make full payment promptly to two sellers (Ledlow & Cole, Inc., and Hiatt Produce, Inc.) of the agreed purchase prices in the total amount of \$169,029.50 for 11 lots of perishable agricultural commodities, which Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce; (2) Respondent is the alter ego of Captain Jack's Tomatoes, Inc.; and (3) Captain Jack's Tomatoes, Inc., under the direction, management, and control of Respondent, willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) when it failed to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce (Compl. ¶¶ III-IV).

On April 7, 2000, Captain Jack's Tomatoes, Inc., filed "Answer of Captain Jack's Tomatoes, Inc." Captain Jack's Tomatoes, Inc.: (1) admits that it, under the direction, management, and control of Respondent, during the period December 7, 1998, through December 29, 1998, failed to make full payment promptly to two sellers of the agreed purchase prices in the total amount of \$169,029.50 for 11 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce; (2) asserts Ledlow & Cole, Inc., was paid \$2,500 on March 3, 1999, and the balance due Ledlow & Cole, Inc., and Hiatt Produce, Inc., is \$2,500 less than the \$169,029.50 alleged in the Complaint; (3) denies that it violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); (4) admits that Respondent is its alter ego; and (5) asserts that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Answer of Captain Jack's Tomatoes, Inc., ¶¶ III-IV).

On April 20, 2000, Respondent filed "Answer of Respondent, The Fresh Group, d/b/a Maglio and Company" [hereinafter Respondent's Answer]. Respondent: (1) admits that during the period December 7, 1998, through December 29, 1998, Respondent managed Captain Jack's Tomatoes, Inc.; (2) asserts Captain Jack's Tomatoes, Inc., during the period December 7, 1998, through December 29, 1998, failed to make full payment promptly to two sellers of the agreed purchase prices in the total amount of \$169,029.50 for 11 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce; (3) asserts Ledlow & Cole, Inc., was paid \$2,500 on March 3, 1999, and the balance due Ledlow & Cole, Inc., is \$2,500 less than the \$57,475.30 alleged in the Complaint; (4) denies that it violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) asserts Captain Jack's Tomatoes, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Respondent's Answer ¶¶ III-IV).

On May 23, 24, and 25, 2001, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided over an oral hearing in Milwaukee, Wisconsin. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, represented Complainant. James O. Vollmar, Waukesha, Wisconsin, represented Captain Jack's Tomatoes, Inc. Jordan B. Reich, Kohner, Mann & Kailas, S.C., Milwaukee, Wisconsin, represented Respondent.

On June 15, 2001, the Chief ALJ entered a Consent Decision agreed to by Complainant and Captain Jack's Tomatoes, Inc.¹ On July 25, 2001, Respondent filed "Respondent, The Fresh Group Ltd d/b/a Maglio & Company's Motion to Dismiss, Proposed Findings of Fact and Conclusions of Law and Proposed Order" [hereinafter Respondent's Post-Hearing Brief] and Complainant filed "Complainant's Proposed Findings of Fact, Conclusions of Law and Proposed Order" [hereinafter Complainant's Post-Hearing Brief]. On September 21, 2001, Respondent filed "Respondent, The Fresh Group Ltd. d/b/a Maglio and Company's

¹See *In re Captain Jack's Tomatoes, Inc.*, 60 Agric. Dec. 381 (2001) (Consent Decision as to Captain Jack's Tomatoes, Inc.).

Reply Brief” and Complainant filed “Complainant’s Reply Brief.”

On November 14, 2001, the Chief ALJ issued a “Decision and Order” [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent, beginning on December 7, 1998, and continuing through December 29, 1998, committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay promptly for 11 lots of perishable agricultural commodities; (2) assessed Respondent a \$150,000 civil penalty; and (3) provided that, in the event Respondent failed to pay the \$150,000 civil penalty within 90 days after the Hearing Clerk served the Initial Decision and Order on Respondent, Respondent’s PACA license would be suspended for 60 days (Initial Decision and Order at 16).

On December 21, 2001, Respondent appealed to and requested oral argument before the Judicial Officer. On January 10, 2002, Complainant filed “Complainant’s Response to Respondent’s Appeal Petition” and “Complainant’s Response to Request for Oral Hearing.” On January 14, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for consideration and decision and a ruling on Respondent’s request for oral argument before the Judicial Officer.

Respondent’s request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because Complainant and Respondent have thoroughly addressed the issues and the issues are not complex; thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the Chief ALJ’s Initial Decision and Order. Therefore, except for minor modifications, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ’s Initial Decision and Order as the final Decision and Order as to The Fresh Group, Ltd., d/b/a Maglio and Company. Additional conclusions by the Judicial Officer follow the Chief ALJ’s conclusion of law as restated.

Complainant’s exhibits are designated by “CX.” Transcript references are designated by “Tr.”

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

(b) Definitions

For purposes of this chapter:

(6) The term “dealer” means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . .

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum

of the outstanding stock of a corporation or association. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.]

§ 499e. Liability to persons injured

(c) Trust on commodities and sales proceeds for benefit of unpaid suppliers, sellers, or agents; preservation of trust; jurisdiction of courts

(2) Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. Payment shall not be considered to have been made if the supplier, seller, or agent receives a payment instrument which is dishonored. The provisions of this subsection shall not apply to transactions between a cooperative association, as defined in section 1141j(a) of title 12, and its members.

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond

**assuring compliance; approval of employment without bond;
change in amount of bond; payment of increased amount; penalties**

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person--

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

....
(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

....
§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499a(b)(6), (9), 499b(4), 499e(c)(2), 499h(a), (b), (e), 499p.

7 C.F.R.:

TITLE 7—AGRICULTURE

....
**SUBTITLE B—REGULATIONS OF THE
DEPARTMENT OF AGRICULTURE:**

**Chapter I—AGRICULTURAL MARKETING SERVICE (STANDARDS,
INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF
AGRICULTURE**

.....
**SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

**PART 46—REGULATIONS (OTHER THAN RULES OF
PRACTICE) UNDER THE PERISHABLE AGRICULTURAL
COMMODITIES ACT, 1930**

Definitions

.....

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

.....

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. “Full payment promptly,” for the purpose of determining violations of the Act, means:

.....

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted[.]

7 C.F.R. § 46.2(aa)(5).

**CHIEF ADMINISTRATIVE LAW JUDGE’S
INITIAL DECISION AND ORDER
(AS RESTATED)**

Statement of the Case

In 1991, Captain Jack’s Tomatoes, Inc., received a PACA license to engage in the business of buying and selling perishable agricultural commodities. Jack Santoro was the president of Captain Jack’s Tomatoes, Inc. Jack Santoro owned 51 percent of the stock in Captain Jack’s Tomatoes, Inc., and Mary Santoro owned 49 percent of the stock in Captain Jack’s Tomatoes, Inc. Jack Santoro testified that in 1996 Captain Jack’s Tomatoes, Inc., was “not in a good financial condition.” Looking for a way to keep Captain Jack’s Tomatoes, Inc., going, Jack Santoro contacted Sam Maglio, president and sole stockholder of Respondent, to have Respondent manage and eventually buy Captain Jack’s Tomatoes, Inc. Respondent, which operates under a PACA license, is a tomato repacker and produce wholesaler. (Tr. 273, 300, 444; CX 1, CX 2.)

Sam Maglio testified that he was hesitant about acquiring a company in financial trouble. He contemplated becoming a stockholder in Captain Jack’s Tomatoes, Inc., but did not contemplate becoming an officer or director. Sam Maglio proposed an arrangement to Jack Santoro whereby he could “get in and look at the company.” (Tr. 446-47, 449.) Jack Santoro agreed with Sam Maglio’s proposal and on June 18, 1996, they entered into the following agreement:

MANAGEMENT AGREEMENT

THIS AGREEMENT, entered into this 18 day of June 1996, by and between **The Fresh Group, Ltd.** ("TFGL"), by Sam J. Maglio, Jr., its President, and **Captain Jack's Tomatoes, Inc.** ("CJTI"), by Jack J. Santoro, its President, sets forth the terms and conditions upon which TFGL will be engaged to perform certain management services for CJTI. The terms, conditions and other material provisions of this Agreement are as follows:

1. **Services provided.** In general, TFGL will provide industry specific expertise in the daily operations and long term strategic planning for CJTI. In addition, TFGL will provide all necessary support to access TFGL's Produce Pro computer software and an office support staff to handle accounting functions as well as integration of the current data systems with TFGL.

2. **Binding input.** TFGL shall have binding input in all areas of CJTI including, but not limited to, accounting, payables, receivables [sic], stockholder distributions, payroll, banking, insurance, purchasing, inventory control, sales, human resources, packaging, taxes, transportation, utilities, and other such categories as may arise. In those areas and in any other which may arise, TFGL shall have the full and complete cooperation of the Stockholders in implementing methods and practices to enhance the value of CJTI.

3. **Continuation of employment.** Jack J. Santoro shall continue employment with CJTI at a salary of \$1000.00 per week and benefits comparable with those he his [sic] currently receiving, consistent with the current expense statement records.

4. **Compensation.** As compensation for its services, TFGL shall be paid the sum of \$52,000.00 annually, to be disbursed as determined by TFGL. In recognition of the value created by its association, TFGL shall be entitled to a bonus equal to 90% of the yearly, pre-tax operating profits of CJTI up to \$150,000.00 of such yearly, pre-tax operating profits. Any yearly, pre-tax operating profits in excess of \$150,000.00 in any given year may be retained by CJTI, to pay down debt.

5. **Term.** The term of this Agreement shall be from July 1, 1996 to June 30, 1999. Further, this Agreement shall be terminable upon 90 days written notice by either party. However, in the event that CJTI wishes to terminate, it must first obtain the written release of TFGL from any provider of credit to CJTI, in a form acceptable to TFGL.

6. **Indemnification.** In executing this Agreement, CJTI hereby agrees, except in cases of TFGL's willful misconduct or gross negligence, to indemnify, defend and hold TFGL, its officers, directors, employees, agents and counsel harmless against and from any and all losses, claims, damages, liabilities, joint and several, suffered, incurred by, or asserted against, TFGL, its officers, directors, employees, agents and counsel, including any amounts paid in settlement of any action, suit or proceeding brought under any statute, at common law or otherwise, which arises in

7. **Other Agreements.** The execution, validity and performance of this Agreement is dependent upon the execution on even date herewith of an **Option to Purchase** between TFGL, Jack J. Santoro and Mary C. Santoro. Neither the Option to Purchase nor this Management Agreement shall be enforceable on its own; both Agreements **must** be executed by the parties for either one to be enforceable.

CAPTAIN JACK'S TOMATOES, INC. THE FRESH GROUP, LTD.

By
/s/
Sam J. Maglio, Jr., President

On June 18, 1996, Jack Santoro and Sam Maglio entered into another agreement giving Sam Maglio the option to purchase all the outstanding stock in Captain Jack's Tomatoes, Inc. (CX 7 at 3-5).

Sam Maglio then hired Barbara Maszk to serve as general manager of Captain Jack's Tomatoes, Inc. She was put on Respondent's payroll as Respondent's employee. Sam Maglio said Barbara Maszk was to work briefly at Respondent to learn how it operated under his direction and was then to "take that knowledge and, again, under my direction implement it at Captain's Jack's" where her "primary function was to oversee the operation in my stead, that she should be organizing the accounts payable and accounts receivable . . . and making it a more efficient operation." (Tr. 360, 455-56.) Barbara Maszk confirmed that she ran the day-to-day operations of Captain Jack's Tomatoes, Inc., hired and fired employees, handled accounts receivable and payable, and signed checks (Tr. 360-61).

Sam Maglio initially visited Captain Jack's Tomatoes, Inc., several times a week but less often after Barbara Maszk became general manager. Barbara

Maszk, however, continued to keep Sam Maglio informed via a computer system that Sam Maglio installed to hook up Captain Jack's Tomatoes, Inc., with Respondent. Sam Maglio would also initial jackets containing invoices of produce purchases to authorize their payment and at times told Barbara Maszk what bills to pay or not to pay. Barbara Maszk would initiate and sign computer generated checks for invoices to be paid. Captain Jack's Tomatoes, Inc., and Respondent bought produce from each other as well as from others. (Tr. 319-20, 346, 380, 418, 457.)

Jack Santoro, meanwhile, retained the title of president of Captain Jack's Tomatoes, Inc., and continued to buy and sell produce. He had access to the computer to verify produce purchases but not to pay for them or to have access to the computer for accounts payable or receivable. Jack Santoro was allowed to attend management meetings but the record does not indicate whether he provided any input. Despite Jack Santoro's protest, Barbara Maszk fired Jack Santoro's son-in-law. (Tr. 270-73, 279, 281-82, 305, 320-21, 457.) Jack Santoro testified he was only a figurehead (Tr. 277). One of Captain Jack's Tomatoes, Inc.'s perishable agricultural commodity suppliers, Brian Hiatt, testified that he "felt that The Fresh Group was the one running Captain Jack's" (Tr. 111).

The relationship between Jack Santoro and Sam Maglio became contentious, and in 1997, Jack Santoro attempted to terminate the management agreement (Tr. 293, 451-52). Sam Maglio, in turn, sought to exercise his option to purchase Captain Jack's Tomatoes, Inc.'s stock followed by a lawsuit for specific performance (Tr. 460-61). In May 1998, Respondent's attorney advised Captain Jack's Tomatoes, Inc., that the shareholders of Captain Jack's Tomatoes, Inc. (Jack Santoro and Mary Santoro), did not have the power to assign assets and assume liabilities without Respondent's "binding input" (CX 6 at 1). On December 1, 1998, Sam Maglio told Jack Santoro that "The Fresh Group, Ltd. management will immediately take over the purchasing of all produce, packaging materials and supplies, and transportation services. You are not to make any purchases without the written consent of Dana Summer, [Respondent's general manager], or Sam Maglio, Jr." (CX 5).

Beginning on December 7, 1998, and continuing through December 29, 1998, Captain Jack's Tomatoes, Inc., failed to make full payment promptly to two produce sellers, Ledlow & Cole, Inc., and Hiatt Produce, Inc., for 11 lots of perishable agricultural commodities Captain Jack's Tomatoes, Inc., had purchased, received, and accepted from them (CX 25-CX 36). Complainant alleges that the amount owed Ledlow & Cole, Inc., was \$57,475.30 and the amount owed Hiatt Produce, Inc., was \$111,554.20 for a total amount owed of \$169,029.50 (Compl. ¶ III). Captain Jack's Tomatoes, Inc., and Respondent admit Captain Jack's Tomatoes, Inc., had failed to make full payment promptly as alleged, but contend Captain Jack's Tomatoes, Inc., owed Ledlow & Cole, Inc., \$54,975.30 rather than \$57,475.30 (Answer of Captain Jack's Tomatoes, Inc. ¶¶ III-IV; Respondent's Answer ¶¶ III-IV).

From November 1998 through March 1999, Barbara Maszk issued checks to Respondent in the approximate amount of \$455,000. Barbara Maszk could not recall the purpose of the payments but just that they were for "payment of bills." (Tr. 369-70.) Sam Maglio indicated that these payments to Respondent included payments for perishable agricultural commodities Captain Jack's Tomatoes, Inc., had purchased from Respondent (Tr. 483).

Sam Maglio testified "money was very tight" at the end of 1998 and into 1999 and he had Barbara Maszk fax him a list of all bills, including those for produce. Sam Maglio said he was trying to work out a plan to make payments

to Ledlow & Cole, Inc., and Hiatt Produce, Inc., and that “any monies that were left over were provided pro rata between those two vendors.” (Tr. 458-59, 462-63.) Sam Maglio indicated that he directed Barbara Maszk to have Captain Jack’s Tomatoes, Inc., pay Respondent before it paid Ledlow & Cole, Inc., and Hiatt Produce, Inc., because, unless Respondent sold perishable agricultural commodities to Captain Jack’s Tomatoes, Inc., it would have no other source of supply (Tr. 475-76). However, Sam Maglio told Brian Hiatt in February 1999 that Captain Jack’s Tomatoes, Inc., had enough money to pay Hiatt Produce, Inc.’s invoices (Tr. 122-23).

In February 1999, Jack Santoro resigned as an officer of Captain Jack’s Tomatoes, Inc. In March 1999, Captain Jack’s Tomatoes, Inc., ceased as a business. (Tr. 302, 461-62; CX 24-A at 3; Answer of Captain Jack’s Tomatoes, Inc. ¶ II(a); Respondent’s Answer ¶ II.)

Hiatt Produce, Inc., instituted a PACA trust suit against Captain Jack’s Tomatoes, Inc., and Respondent in the United States District Court for the Eastern District of Wisconsin (Tr. 110-11; CX 8). In a March 31, 2000, decision, the Court found that “[b]ecause of the complete control which Fresh Group exercised over Captain Jack’s, it is clear that The Fresh Group, in addition to Captain Jack’s, was a fiduciary of the PACA trust. The Fresh Group breached its fiduciary duty by self dealing and by refusing to pay certain PACA creditors when funds were available apparently to do so” (CX 8 at 10).

Discussion

The failure of Captain Jack’s Tomatoes, Inc., to pay promptly for the purchase of 11 lots of perishable agricultural commodities totaling approximately \$169,029.50 constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Complainant contends Respondent should also be held liable for the violations on the grounds that the violations were committed “while [Respondent was] acting for or employed by [Captain Jack’s Tomatoes, Inc.,] within the scope of its employment” and Respondent dominated and controlled Captain Jack’s Tomatoes, Inc., to the extent that Respondent became Captain Jack’s Tomatoes, Inc.’s alter ego (Complainant’s Post-Hearing Brief at 10-19).

Respondent moves to dismiss the Complaint on the ground that Complainant has failed to state a claim upon which relief can be granted. Respondent argues that it cannot be held liable because it was not “responsibly connected” with Captain Jack’s Tomatoes, Inc., as a partner, officer, or director, or as a holder of more than 10 per centum of the stock of Captain Jack’s Tomatoes, Inc. (Respondent’s Post-Hearing Brief.) This argument is not relevant to this proceeding. Whether a person is responsibly connected arises in proceedings instituted under section 8(b) of the PACA (7 U.S.C. § 499h(b)) to determine whether a person is barred from employment by a PACA licensee because of his or her connection with any person: (1) whose PACA license has been revoked or is currently suspended; (2) who has been found to have committed any flagrant or repeated violation of section 2 of the PACA (7 U.S.C. § 499b); or (3) against whom there is an unpaid reparation award issued within 2 years. This proceeding is not a proceeding instituted under section 8(b) of the PACA (7 U.S.C. § 499h(b)) to determine whether Respondent is responsibly connected with Captain Jack’s Tomatoes, Inc., and barred from employment by PACA licensees. Instead, this proceeding is an administrative disciplinary proceeding instituted under the PACA to determine whether willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) have been

committed and, if they have been committed, the identity of the entity or entities that committed the violations.

Respondent further argues, citing *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239 (1995), the alter ego theory of liability applies only when the alleged alter ego is a stockholder of the entity that committed the violations. In this case, Respondent points out, Respondent did not own any stock of Captain Jack's Tomatoes, Inc. (Respondent's Post-Hearing Brief at 5th through 7th unnumbered pages.) *Midland*, however, also held that a person, whether a stockholder or not, who exercises day-to-day direction, management, and control over an entity which buys or sells perishable agricultural commodities is itself a "dealer" as that term is defined in the PACA. *Midland*, 54 Agric. Dec. at 1303.

Midland went on to hold "[i]n determining whether an order should be made applicable to an individual respondent, the Department examines the totality of the circumstances surrounding the violation rather than the form of the business entity involved in order to effectuate the purposes of the statutes it administers." *Midland*, 54 Agric. Dec. at 1261. In this case, Respondent, through its agents Barbara Maszk and Sam Maglio, was clearly responsible for decisions relating to Captain Jack's Tomatoes, Inc.'s purchases of and payments for perishable agricultural commodities. As its manager, Respondent exercised complete domination and control over the day-to-day operations of Captain Jack's Tomatoes, Inc., during the time the violations occurred. Respondent was therefore a dealer and bore responsibility for Captain Jack's Tomatoes, Inc.'s unlawful actions. Accordingly, I find Respondent engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay promptly for perishable agricultural commodity purchases.

Complainant seeks a \$150,000 civil penalty or, if Respondent does not pay the \$150,000 civil penalty, a 60-day suspension of Respondent's PACA license (Complainant's Post-Hearing Brief at 19-24). Respondent contends that, even assuming it committed a violation, there is no evidentiary basis for any sanction (Respondent's Post-Hearing Brief at 7th unnumbered page).

The factors to consider in imposing a sanction were set forth in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 569 (1998): "(1) the length of time during which a respondent was in violation of the payment requirements of the PACA; (2) the number of a respondent's violations and the dollar amounts involved; (3) the roll-over debt, if any, incurred by the PACA violator; (4) the time that it takes the PACA violator to achieve compliance with the PACA; (5) the impact of the violations on the industry as a whole; and (6) whether the PACA violator's financial condition is such that an appropriate civil penalty, large enough to be an effective deterrent to future violations of the PACA, would not substantially increase the risk that the PACA violator's future produce sellers may not be paid in accordance with the PACA."

Basil Coale, a United States Department of Agriculture senior marketing specialist, testified that the dollar amount of Respondent's violations was over \$160,000; that one of the violative produce transactions was paid over 570 days late; that the average violative produce transaction was paid 480 days late; that, concerning the impact on the industry, Captain Jack's Tomatoes, Inc., has been forced out of business, Hiatt Produce, Inc., can no longer sell to Captain Jack's Tomatoes, Inc., and Hiatt Produce, Inc., was forced to file suit to obtain relief; and that no roll-over debt was incurred. Basil Coale was of the opinion that the recommended sanction was necessary to be an effective deterrent to future violators and that the sanction would not risk Respondent's future payments to its produce sellers (Tr. 537-41).

I find two additional factors significant. First, Respondent failed to pay Captain Jack's Tomatoes, Inc.'s produce sellers promptly despite apparently having the money to do so. Second, Respondent used the money, which it was required by section 5(c)(2) of the PACA (7 U.S.C. § 499e(c)(2)) to hold in trust for the benefit of perishable agricultural commodity sellers, to pay itself. As for evidence on whether Complainant's proposed civil penalty may affect Respondent's financial condition, the burden was on Respondent to present evidence that a \$150,000 civil penalty would substantially increase the risk that Respondent's future produce sellers would not be paid in accordance with the PACA. *Scamcorp*, 57 Agric. Dec. at 569 n.20. Respondent presented no evidence on its financial condition.

Considering all the circumstances, I find Complainant's recommended \$150,000 civil penalty and 60-day suspension of Respondent's PACA license appropriate. The 60-day suspension of Respondent's PACA license will not be imposed if James Frazier receives Respondent's payment of the \$150,000 civil penalty within 90 days after the Order in this Decision and Order as to The Fresh Group, Ltd., d/b/a Maglio and Company, is served on Respondent.

Findings of Fact

1. Captain Jack's Tomatoes, Inc., was a corporation organized and existing under the laws of the State of Wisconsin. Captain Jack's Tomatoes, Inc.'s mailing address was 883 W 18890 Saturn Drive, Muskego, Wisconsin 53150. Captain Jack's Tomatoes, Inc., ceased doing business on March 12, 1999.

2. At all times material to this proceeding, Captain Jack's Tomatoes, Inc., was engaged in the business of buying and selling perishable agricultural commodities and was licensed under the PACA. PACA license number 920157 was issued to Captain Jack's Tomatoes, Inc., on November 6, 1991.

3. At all times material to this proceeding, Jack Santoro was the president of Captain Jack's Tomatoes, Inc. At all times material to this proceeding Jack Santoro and Mary Santoro were the stockholders of Captain Jack's Tomatoes, Inc.

4. Respondent is a corporation organized and existing under the laws of the State of Wisconsin. Respondent's business mailing address is 4287 N. Port Washington Road, Milwaukee, Wisconsin 53212.

5. At all times material to this proceeding, Respondent was engaged in the business of buying and selling perishable agricultural commodities and was licensed under the PACA. PACA license number 950744 was issued to Respondent on February 14, 1995. Respondent's PACA license has been renewed on an annual basis and is next subject for renewal on February 14, 2003.

6. At all times material to this proceeding, Sam Maglio was the president and owner of Respondent.

7. On June 18, 1996, Captain Jack's Tomatoes, Inc., and Respondent entered into a management agreement through which Respondent managed Captain Jack's Tomatoes, Inc.'s business operations and had binding input in all areas of the operation of Captain Jack's Tomatoes, Inc., including, but not limited to: accounting, payables, receivables, stockholder distributions, payroll, banking, insurance, purchasing, inventory control, sales, human resources, packaging, taxes, transportation, utilities, and any other categories as may arise. The management agreement also provides Respondent was to have full and complete cooperation of the stockholders of Captain Jack's Tomatoes, Inc.

8. The management agreement directed that Respondent would be

entitled to 90 percent of the yearly pre-tax operating profits of Captain Jack's Tomatoes, Inc.

9. Under the management agreement, Respondent was paid \$52,000 per year for its management of Captain Jack's Tomatoes, Inc.

10. Respondent hired Barbara Maszk in August 1996 for the purpose of managing Captain Jack's Tomatoes, Inc. At all times material to this proceeding, Barbara Maszk was Respondent's employee and worked on site at Captain Jack's Tomatoes, Inc., with the specific responsibility of managing Captain Jack's Tomatoes, Inc.'s day-to-day business operations.

11. Barbara Maszk exercised the authority to issue and sign Captain Jack's Tomatoes, Inc.'s checks to pay for perishable agricultural commodities.

12. In May 1998, Respondent's attorney, citing the management agreement, informed Captain Jack's Tomatoes, Inc., that the stockholders of Captain Jack's Tomatoes, Inc. (Jack Santoro and Mary Santoro), no longer had the power to assign assets and assume liabilities without Respondent's binding input.

13. On December 1, 1998, Respondent, operating under the management agreement, removed Jack Santoro's responsibility for produce sales at Captain Jack's Tomatoes, Inc., and required Jack Santoro to obtain Respondent's written approval for any produce purchases.

14. From November 1998 through March 1999, Barbara Maszk issued checks from Captain Jack's Tomatoes, Inc., payable to her employer, Respondent, in the approximate amount of \$455,000 while debts for perishable agricultural commodities were owed to other perishable agricultural commodity suppliers.

15. While operating under its management agreement with Respondent, Captain Jack's Tomatoes, Inc., failed, during the period December 7, 1998, through December 29, 1998, to make full payment promptly to two sellers (Ledlow & Cole, Inc., and Hiatt Produce, Inc.) of the agreed purchase prices in the total amount of approximately \$169,029.50 for 11 lots of perishable agricultural commodities that Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce.

16. One of the violative produce transactions was paid over 570 days late. The average violative produce transaction was paid 480 days late.

17. The United States District Court for the Eastern District of Wisconsin in a PACA trust hearing over the same debts owed to Hiatt Produce, Inc., by Captain Jack's Tomatoes, Inc., in this case found that Respondent was in complete control of the business operations of Captain Jack's Tomatoes, Inc.

18. At all times material to this proceeding, Respondent dominated and controlled all aspects of the day-to-day management of Captain Jack's Tomatoes, Inc.'s business operations and controlled the timing and amount of payments that Captain Jack's Tomatoes, Inc., made to Respondent and other perishable agricultural commodity suppliers.

Conclusion of Law

Respondent, beginning on December 7, 1998, and continuing through December 29, 1998, committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay promptly for 11 lots of perishable agricultural commodities which Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues in its “Appeal Petition to the Judicial Officer” [hereinafter Appeal Petition] and “Brief of the Respondent, The Fresh Group Ltd. d/b/a Maglio & Company, In Support of Its Appeal Petition to the Judicial Officer” [hereinafter Appeal Brief]. First, Respondent contends the Chief ALJ’s conclusion that Respondent can be held liable for the failures of Captain Jack’s Tomatoes, Inc., to pay for perishable agricultural commodities in accordance with the PACA, is contrary to the facts and law (Respondent’s Appeal Pet. at 1; Respondent’s Appeal Brief at 4-8). Specifically, Respondent contends the record contains no evidence to establish that it was “responsibly connected,” as that term is defined in section 1a(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Captain Jack’s Tomatoes, Inc., and Complainant must prove Respondent was responsibly connected with Captain Jack’s Tomatoes, Inc., in order to establish that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Respondent’s Appeal Brief at 5).

I disagree with Respondent’s contention that Complainant must establish Respondent was responsibly connected with Captain Jack’s Tomatoes, Inc., in order to prove that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Administrative proceedings to determine whether a person is “responsibly connected,” as that term is defined in section 1a(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), are instituted under section 8(b) of the PACA (7 U.S.C. § 499h(b)). The issue in these “responsibly connected” cases is whether one person is or has been responsibly connected with any person: (1) whose PACA license has been revoked or is currently suspended; (2) who has been found to have committed any flagrant or repeated violation of section 2 of the PACA (7 U.S.C. § 499b); or (3) against whom there is an unpaid reparation award issued within 2 years. A person found to be responsibly connected is barred from employment by PACA licensees, except as provided in section 8(b) of the PACA (7 U.S.C. § 499h(b)).

This proceeding is not a proceeding instituted under section 8(b) of the PACA (7 U.S.C. § 499h(b)) to determine whether Respondent is responsibly connected with Captain Jack’s Tomatoes, Inc., and barred from employment by PACA licensees. Instead, this proceeding is an administrative disciplinary proceeding instituted under the PACA to determine whether willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) have been committed and, if they have been committed, the identity of the entity or entities that committed the violations.

Respondent cites *Hart v. Department of Agric.*, 112 F.3d 1228 (D.C. Cir. 1997), *Bell v. Department of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994), *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966), *Bronia, Inc. v. Ho*, 873 F. Supp. 854 (S.D.N.Y. 1995), and *Shepard v. K.B. Fruit & Vegetable, Inc.*, 868 F. Supp. 703 (E.D. Pa. 1994), to support its contention that Complainant must establish Respondent was responsibly connected with Captain Jack’s Tomatoes, Inc., in order to prove that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Respondent’s Appeal Brief at 5). I have reviewed each of these cases. None of the cases cited by Respondent supports Respondent’s contention that Complainant must establish Respondent was responsibly connected with Captain Jack’s Tomatoes, Inc., in order to prove that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Hart, *Bell*, and *Birkenfield*, are “responsibly connected” cases. The issue in *Hart* and *Bell* is the connection between persons alleged to be responsibly connected with PACA licensees found to have flagrantly and repeatedly violated section 2 of the PACA (7 U.S.C. § 499b). The issue in *Birkenfield* is the

connection between a person alleged to be responsibly connected with a PACA licensee against which there was an unpaid reparation award. *Hart, Bell*, and *Birkenfield* do not concern the issues in this proceeding; namely, whether willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) have been committed and, if they have been committed, the identity of the entity or entities that committed the violations. None of these “responsibly connected” cases supports or even addresses Respondent’s contention that Complainant must establish Respondent was responsibly connected with Captain Jack’s Tomatoes, Inc., in order to prove that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Bronia is a PACA trust case involving private litigants in which the United States District Court for the Southern District of New York held that unpaid sellers of perishable agricultural commodities properly preserved their trust claims against a corporate produce purchaser and held that the sole shareholder, director, and president of the corporate produce purchaser was personally liable for the corporate produce purchaser’s breach of the PACA statutory trust. The Court does not discuss or mention the term “responsibly connected.” Similarly, *Shepard* is a PACA trust case involving private litigants in which the United States District Court for the Eastern District of Pennsylvania held that, based on their active involvement in the business operations of a PACA licensee and their failure to supervise the person who actually ran the PACA licensee, the owners, officers, and directors of a PACA licensee were personally liable for a PACA licensee’s failure to pay a produce supplier.

Respondent also contends the record does not support a finding that Respondent is Captain Jack’s Tomatoes, Inc.’s alter ego (Respondent’s Appeal Brief at 5-7). Even if I were to agree with Respondent, I would not find the Chief ALJ erred because the Chief ALJ did not base his conclusion that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) on a finding that Respondent was Captain Jack’s Tomatoes, Inc.’s alter ego. Instead, the Chief ALJ found that, during the time the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) occurred, Respondent completely dominated and controlled the day-to-day operations of Captain Jack’s Tomatoes, Inc., including decisions related to the purchases of and payments for perishable agricultural commodities. The Chief ALJ concluded that: (1) Respondent was a “dealer,” as defined in section 1(b)(6) of the PACA (7 U.S.C. § 499a(b)(6)), in connection with the payment violations that are the subject of this proceeding; (2) Respondent bore direct responsibility for the failures to pay for perishable agricultural commodities that are the subject of this proceeding; and (3) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). (Initial Decision and Order at 11.)

I agree with the Chief ALJ’s conclusions. Even if a person is not an owner of an entity, that person may still be found responsible for willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by the entity. The person’s liability may attach because: (1) the person is subject to the PACA; (2) the person is the day-to-day manager of the violating entity; (3) the person exercises direction, management, and control of the violating entity; and (4) the person is the one most responsible for the entity’s violations. As discussed in this Decision and Order as to The Fresh Group, Ltd., d/b/a Maglio and Company, *supra*: (1) Respondent was a “dealer,” as defined in section 1(b)(6) of the PACA (7 U.S.C. § 499a(b)(6)), in connection with the payment violations that are the subject of this proceeding; (2) Respondent was the day-to-day manager of Captain Jack’s Tomatoes, Inc., during the period the violations

of section 2(4) of the PACA (7 U.S.C. § 499b(4)) occurred; (3) Respondent exercised direction, management, and control of Captain Jack's Tomatoes, Inc., during the period the violations of section 2(4) of the PACA occurred (7 U.S.C. § 499b(4)); and (4) Respondent was the one most responsible for the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) that are the subject of this proceeding.

Second, Respondent contends the Chief ALJ erroneously denied Respondent's "Motion in Limine Barring the Complainant From Offering or Introducing Any Evidence to Support a Civil Penalty in Excess of \$22,000.00" and erroneously denied Respondent's motion during the hearing to place a \$22,000 limit on the civil penalty that Complainant's sanction witness could recommend. Respondent contends the assessment of a civil penalty against Respondent in excess of \$22,000 is contrary to law. (Respondent's Appeal Pet. at 3; Respondent's Appeal Brief at 8-9.)

I reject Respondent's contention that the Chief ALJ erroneously denied Respondent's "Motion in Limine Barring the Complainant From Offering or Introducing Any Evidence to Support a Civil Penalty in Excess of \$22,000.00" and erroneously denied Respondent's motion to place a \$22,000 limit on the civil penalty that Complainant's sanction witness could recommend. Even if I agreed with Respondent's contention that the assessment of a civil penalty against Respondent in excess of \$22,000 is contrary to law (which I do not), I would not find that the Chief ALJ erroneously denied Respondent's "Motion in Limine Barring the Complainant From Offering or Introducing Any Evidence to Support a Civil Penalty in Excess of \$22,000.00" and erroneously denied Respondent's motion during the hearing to place a \$22,000 limit on the civil penalty that Complainant's sanction witness could recommend.

The Administrative Procedure Act provides, as follows:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

....

(d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides, as follows:

§ 1.141 Procedure for hearing.

....

(h) *Evidence.* (1) *In general.*

....

(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule

36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. Therefore, oral or documentary evidence introduced by Complainant to support a recommended sanction is relevant and may be received. Moreover, even if Complainant introduced evidence in an attempt to support a sanction that is not warranted in law or administrative officials testified in support of a sanction that is not warranted in law, neither the Administrative Procedure Act nor the Rules of Practice prohibits the introduction and receipt of such evidence. Complainant's recommended sanction is not controlling,² and an administrative law judge may and should reject a sanction recommended by administrative officials, if the recommended sanction is not warranted in law.

Moreover, assessment of a civil penalty against Respondent in excess of \$22,000 is not contrary to law, as Respondent contends. The record supports the Chief ALJ's conclusion that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay promptly for 11 lots of perishable agricultural commodities which Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce. Respondent argues that section 8(e) of the PACA (7 U.S.C. §

²*In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. ___, slip op. at 35 (Jan. 4, 2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *appeal docketed*, No. 02-3006 (6th Cir. Jan. 2, 2002); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *appeal docketed*, No. 01-71486 (9th Cir. Sept. 10, 2001); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *appeal docketed*, No. CIV F 015606 AWI SMS (E.D. Cal. May 18, 2001); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *aff'd*, No. 01-3508 (6th Cir. Apr. 17, 2002); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal docketed*, No. 01-6214 (2d Cir. Oct. 9, 2001); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (*per curiam*); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

499h(e)) provides that the Secretary of Agriculture may assess a civil penalty not to exceed \$2,000 for each of Respondent's 11 violative transactions (Respondent's Appeal Brief at 9). However, section 8(e) of the PACA (7 U.S.C. § 499h(e)) clearly provides that the Secretary of Agriculture may assess a civil penalty not to exceed \$2,000 for each violative transaction *or* each day the violation continues. Complainant proved by a preponderance of the evidence that Respondent's violative transactions were past due for an average of 480 days before they were paid and there was one transaction that was paid over 570 days late (Tr. 539). Applying the average number of days for each of Respondent's 11 violative transactions, Respondent could be assessed a \$10,560,000 civil penalty.³ Therefore, I reject Respondent's contention that the assessment of a civil penalty against Respondent in excess of \$22,000 is contrary to law.

Third, Respondent contends the Chief ALJ's assessment of a \$150,000 civil penalty against Respondent and the Chief ALJ's imposition of a 60-day suspension of Respondent's PACA license are not supported by relevant and credible evidence. Specifically, Respondent contends the civil penalty assessed by the Chief ALJ is based on Complainant's sanction witness' recommended sanction which in turn is based upon documents Respondent provided to Complainant's counsel during settlement negotiations. (Respondent's Appeal Pet. at 1-2; Respondent's Appeal Brief at 10-13.)

The record supports Respondent's contention that Basil Coale, Complainant's sanction witness, based his civil penalty recommendation on, among other things, Respondent's financial condition and that his knowledge of Respondent's financial condition was based on documents obtained from Complainant's counsel, who obtained the documents from Respondent during settlement negotiations, as follows:

[BY MR. RUDOLPH:]

Q. In calculating this sanction how did the agency know Fresh Group's financial information to make all these determinations?

[BY MR. COALE:]

A. They had submitted copies of financial statements.

Q. They being the Fresh Group?

A. Yes.

MR. REICH: Your Honor, at this time I'd like to voir dire the witness, because I have some -- maybe a specific objection as to how they obtained that financial information and when they obtained that financial information and under what circumstances they did.

JUDGE HUNT: Do you need it on voir dire or cross-examination?

³I calculate this \$10,560,000 civil penalty by multiplying the average number of days each violation continued times the number of violative transactions times the maximum civil penalty that may be assessed for each day a violation continues. (480 x 11 x \$2,000 = \$10,560,000.)

MR. RUDOLPH: Your Honor, I would object to that.

JUDGE HUNT: Do you need to do that by voir dire or by cross-examination?

MR. REICH: I would do it by voir dire because then I might have an evidentiary objection.

JUDGE HUNT: All right. I'll allow him to voir dire on that one point.

VOIR DIRE

BY MR. REICH:

Q. When did you obtain this financial information?

A. I believe it was in March of this year?

Q. How did you obtain it?

A. From -- it came to me through Mr. Rudolph.

Q. Do you know how he obtained it?

A. Yes, I do.

Q. How did he obtain it?

A. From Fresh Group counsel.

MR. REICH: Your Honor, let me raise this objection. During the course of settlement discussions we provided certain financial information to try to reach a settlement. I'm sure the Court realizes that under the federal rules of evidence any materials, any discussions held in regards to settlement cannot be used in a court of law as far as evidence, and I find this to be both extremely objectionable -- and I'll be very frank with counsel for the department -- extremely unethical.

He was aware of the fact that this information was submitted on the basis of settlement discussions. If they had wanted financial information they had ways of obtaining it.

JUDGE HUNT: Did you obtain that in the course of settlement discussions?

MR. RUDOLPH: Yes, Your Honor, we did. We'd been asking for that information for many months prior, and the agency routinely asks for this information to come up with a sanction that we can discuss. It happens in every case.

JUDGE HUNT: I know, but you did obtain it though through -- as part of the settlement discussion.

MR. RUDOLPH: As part of the overall settlement discussion. That was part of it as well, but the agency does this routinely in –

JUDGE HUNT: Not routinely using material from settlement -- in litigation, do they?

MR. RUDOLPH: I believe they do. Yes, Your Honor.

JUDGE HUNT: I'm not familiar with that.

I sustain Mr. Reich's objection to relying on information obtained as part of the settlement proceeding. I'll sustain it. You're referring to their financial statement, financial situation. That's provided -- if you know about it only through your settlement discussion I find that inappropriate.

MR. REICH: Then I would ask that this witness's entire testimony be stricken and that the Government is unable to prove a sanction amount, and then their case has to be dismissed.

JUDGE HUNT: Well, I'll deny the motion to strike, but to the extent that he's relying on information obtained through settlement in recommending a sanction I'll not consider that.

MR. REICH: If that's –

JUDGE HUNT: To that extent –

MR. REICH: -- if that's the only basis for his –

JUDGE HUNT: I don't know if it is. I'll allow Mr. Rudolph to pursue that further.

MR. REICH: I was going to ask as part of the voir dire, is that the sole basis for your determination as to what the sanction is?

JUDGE HUNT: Well, you can do that on cross-examination.

MR. REICH: Okay. Thank you, Your Honor.

JUDGE HUNT: And I would take exception to the ruling on this. The department believes that in most of its negotiations and discussions with Respondents it's quite common that they share information with regards to the financial situation of a firm, and they may do that, but to use that information, that's rather -- it is confidential. At that point, that's -- well, go -- if you think the -- if that's the department's policy I'm not aware of that --

MR. RUDOLPH: All right.

JUDGE HUNT: -- but if the department uses it then that's not for me to take up apart from this case. Go ahead.

MR. RUDOLPH: Thank you.

. . . .

CROSS EXAMINATION

BY MR. REICH:

....

Q. Let me go on then, assuming there are no Jencks materials. Is the sole basis of your questioned[sic] sanction based on the financial documents provided to you by Mr. Rudolph?

A. That is the how monetary penalty assessed was calculated.

Q. And that's the sole basis?

A. Yes, sir.

Q. You had no other financial information?

A. Not that I'm aware of.

Q. Without that financial information you could not have arrived at any type of penalty. Correct?

A. That's correct.

MR. REICH: Again, I'm going to move to strike the entire line of testimony if that is the sole basis, because the material -- we want to use it in the criminal sense -- is ill-gotten fruit.

MR. RUDOLPH: Your Honor, on redirect -- I think we should be allowed to redirect before you make any kind of ruling.

JUDGE HUNT: All right. I'm going to deny the motion to strike.

BY MR. REICH:

Q. How would you arrive at a penalty if you didn't have financial information?

A. If we didn't have financial information and we could not find out adequate information to meet the requirements of the judicial officer as he set out in Scamcorp then we could not go down the road of a monetary penalty and we would have to look then at suspension.

....

REDIRECT EXAMINATION

BY MR. RUDOLPH:

Q. Mr. Coale, with regards to the financial information through which you based your decision isn't it true that as part of the Respondent's litigation -- in preparation for this litigation you shared with the department as part of this proposed exhibits copies of the financial information of the Fresh Group?

MR. REICH: Your Honor, again, I'm going to object. They have not been introduced into evidence. They are again the initial

offering was part of the settlement. The only reason they were put in as potential evidence was to refute any sanctions. If in fact they're unavailable -- I'm not intending to use them nor do I think the department can use them.

MR. RUDOLPH: Your Honor --

JUDGE HUNT: He's referring to pretrial exhibits.

MR. RUDOLPH: But the idea is that we had this information anyway as part of the litigation. The department had this information.

JUDGE HUNT: I haven't sustained the objection. Proceed further on. I don't know what this information is or how you obtained it.

MR. RUDOLPH: All right. But the point being that we had it already as part of the litigation if not settlement.

JUDGE HUNT: Well, I don't know how you obtained it.

MR. RUDOLPH: All right. I understand.

JUDGE HUNT: That's the key here, how did you obtain that information?

MR. RUDOLPH: All right. I have nothing further on redirect.

Tr. 541-45, 551-53, 557-58.

Complainant responds that Respondent filed with the Hearing Clerk a copy of the documents Basil Coale used as a basis for his testimony regarding Respondent's financial condition. Complainant contends once Respondent voluntarily filed these documents with the Hearing Clerk, Complainant's sanction witness was free to testify regarding the contents of Respondent's documents despite Respondent's earlier provision of the documents in connection with settlement negotiations. (Complainant's Response to Respondent's Appeal Petition at 22.)

The record establishes that on April 20, 2001, Respondent filed with the Hearing Clerk Respondent's proposed witness list, Respondent's proposed exhibit list, and Respondent's proposed exhibits. Respondent states in the cover letter transmitting these documents to the Hearing Clerk that, under separate cover, copies are being provided to Complainant's counsel and Captain Jack's Tomatoes, Inc.'s counsel. Respondent's proposed exhibits include Respondent's December 31, 2000, balance sheet and income statement. Basil Coale's testimony regarding Respondent's financial condition is consistent with the information contained in the December 31, 2000, balance sheet and income statement filed with the Hearing Clerk by Respondent. Respondent's April 20, 2001, filing was not supplied in the context of settlement negotiations, and Complainant had no reason to treat Respondent's April 20, 2001, filing as confidential. Therefore, I agree with Complainant's contention that once Respondent filed the December 31, 2000, balance sheet and income statement with the Hearing Clerk, Complainant's sanction

witness could testify regarding their contents and base his sanction recommendation on their contents. Therefore, I reject Respondent's contention that the sanction imposed by the Chief ALJ is not supported by admissible evidence.

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent, The Fresh Group, Ltd., d/b/a/ Maglio and Company, is assessed a \$150,000 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

James Frazier
United States Department of Agriculture
Agricultural Marketing Service
Fruit and Vegetable Division
PACA Branch
Room 2095 South Building
1400 Independence Avenue, SW
Washington, DC 20250-0242

Respondent's payment of the civil penalty shall be forwarded to, and received by, James Frazier within 90 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to PACA Docket No. D-00-0008. In the event James Frazier does not receive a certified check or money order in accordance with this Order, Respondent's PACA license shall be suspended for 60 days beginning 91 days after service of this Order on Respondent.
